In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 719

ALBERT EDWARDS AND S. FRANK EDWARDS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals *en banc* (Pet. App. B) is reported at 334 F. 2d 360. The original opinion of a panel of that court (Pet. App. A) is reported at 321 F. 2d 324.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on July 10, 1964. A subsequent petition for rehearing was denied on September 23, 1964. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 22, 1964, which was a Sunday. The petition was filed on

November 23, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' convictions for willfully failing to register and to pay the occupational tax while engaged in the business of receiving wagers.

2. Whether the court correctly instructed the jury on willfulness.

STATEMENT

Petitioners were convicted after trial by jury in the United States District Court for the Southern District of Florida of violating 26 U.S.C. 7203 by willfully failing to register and to pay the occupational wagering tax imposed by 26 U.S.C. 4411 and 4412 (R.I. 32; R. II, 4).[1] Petitioner Frank Edwards was sentenced to imprisonment for one year (R. I, 33–34), and petitioner Albert Edwards to ten months (R. II, 6–7). A panel of the court of appeals reversed both convictions on the ground that the government had failed to prove that petitioners knew of the obligations to register and to pay the federal tax. The court of appeals *en banc* reversed that ruling and affirmed both convictions.

1. The evidence may be summarized as follows:

Petitioners Frank Edwards and Albert Edwards are father and son (Tr. 226). In November and December 1959 two informers purchased lottery tickets from Albert Edwards in the Green Palace Bar

[1] The record is in three volumes. "R. I" and "R. II" refer to the records on appeal of Frank and Albert Edwards, respectively. "Tr." is the trial transcript.

in Bradenton, Florida (Tr. 126–131, 139–144, 191–194). They also observed sales to others by Albert Edwards (Tr. 127–128, 143–144). In the latter part of November 1959, State and federal officials conducted surveillances of the Green Palace Bar and a nearby house owned by Frank Edwards. They observed Frank Edwards meeting various persons in the parking lot behind the bar (Tr. 72–73); accepting packages from them (Tr. 119, 150–152); going in and out of the house (Tr. 73–74, 114, 152); and carrying a five-gallon can in the vicinity of the bar and house (Tr. 74, 89–90, 114). A former employee of the Green Palace Bar for the period in question testified that he observed Frank Edwards carrying paper sacks under his shirt and retrieving sacks left for him in the mail box (Tr. 135–137). Search warrants were executed in the early morning hours of Saturday, December 5, 1959, and paraphernalia used in lottery operations were then discovered in the house and bar office (Tr. 16–32, 59–63, 153–155, 162–189). The five-gallon can was found under an adjoining house, and it was filled with lottery paraphernalia (Tr. 112–113, 189–191). During the search of the Green Palace Bar, Frank Edwards was arrested with more than $1,000 on his person (Tr. 32–36, 69–70). On arrest, Frank Edwards admitted that he owned the house, but claimed that he had rented it to a person whom he refused to identify (Tr. 40, 65). When asked by a Federal Internal Revenue agent if he had ever accepted any wagers, he said, "Don't ask me any more questions like that. I am not simple" (Tr. 64).

Frank Edwards had been arrested for a lotte :y offense in 1949 (Tr. 236). Both defendants at trial denied being in the lottery business. They were not asked whether they knew of the federal wagering tax obligations (Tr. 223–237).

2. The district court instructed the jury as follows (Tr. 249–250):

> Now, you will note that the omission or failure to act charged in the information is alleged to have been willfully done. A failure to act is willfully done if done voluntarily and purposely and with a specific intent to fail to do what the law requires to be done. That is to say, with that purpose either to disobey or disregard the law.
>
> It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law unless and until outweighed by evidence to the contrary. The presumption is that every person knows what the law forbids and what the law requires to be done.
>
> However, evidence if any that the accused acted or failed to act because of ignorance of the law is to be considered in determining whether or not the accused acted or failed to act with specific intent as alleged.

No objection was made to the charge (Tr. 252).

ARGUMENT

1. Petitioners first contend that the government failed to prove willful failure to register and pay the federal gambling tax. It is a well-settled rule that the element of willfulness requires proof of knowledge of

the legal obligation to register and file a tax return (*e.g.*, *Haner* v. *United States*, 315 F. 2d 792 (C.A. 5); *Yarbrough* v. *United States*, 230 F. 2d 56 (C.A. 4), certiorari denied, 351 U.S. 969; *Hargrove* v. *United States*, 67 F. 2d 820 (C.A. 5)), but the evidence in this case was sufficient to permit the jury to draw the required inference of knowledge.

Petitioners were concededly (Pet. 13) a "banker" and a "writer" in a lottery operation, as those terms are defined in *United States* v. *Calamaro*, 354 U.S. 351; neither of them had registered or paid the required federal tax. Petitioners also concede that "some of the activities of each of the Petitioners could have been said to have been done in secrecy" (Pet. 13–14). Under this Court's decision in *Ingram* v. *United States*, 360 U.S. 672, 677, this evidence, in and of itself, would suffice to sustain petitioners' convictions for willful failure to register and pay the federal wagering tax. A jury may infer, in the absence of evidence to the contrary, that persons engaging in the business of gambling in a proprietary capacity know of federal laws which have affected the conduct of such business for the past twelve years. See *United States* v. *Marquez*, 332 F. 2d 162, 165 (C.A. 2), certiorari denied, No. 389, this Term, October 26, 1964; *United States* v. *Russo*, 335 F. 2d 299 (C.A. 7), petition for a writ of certiorari pending, No. 576, this Term.

Moreover, there was additional circumstantial evidence of knowledge in this case, particularly as to petitioner Frank Edwards. He had been arrested for a lottery offense as early as 1949, and on being arrested

on the present charge he responded to questions about his wagering operations by saying, "Don't ask me any more questions like that. I am not simple." When considered together with proof of the furtive manner in which he carried on his operations, this evidence supports a conclusion that he knew of the federal statutes from prior experience and failed to abide by them not out of ignorance but out of a desire to keep his operations secret. And the jury could also infer that Albert, who was associated as a "writer" in the lottery business with his father, would know enough about the business to be aware of the duty to pay a federal tax. His role in the operation as well as his relationship to the "banker" placed him in a different position from the employees whose convictions were reversed in *Ingram*.

2. Although the court's instruction to the jury might have been more felicitously phrased had the word "inference" been substituted for "presumption," the language used by the court was not so prejudicial as to constitute "plain error" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure. Since petitioners made no objection to the charge and since the instructions fairly presented the issue of willfulness to the jury in terms of the evidence presented at the trial, the court of appeals correctly rejected petitioners' claims, and there is no reason for further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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